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IN THE MATTER OF THE FORMAL COMPAINT OF SWING FIRST GOLF, LLC AGAINST JOHNSON UTILITIES LLC.

DOCKET NO. WS-02987A-16-0017

STAFF'S RESPONSE TO MOTION TO DISMISS

The Utilities Division ("Staff") of the Arizona Corporation Commission ("Commission") files its response to the Motion to Dismiss filed by Johnson Utilities LLC ("Johnson" or "Company").

On January 19, 2016, Swing First Golf LLC ("SFG") filed a complaint with the Commission against Johnson, alleging that Johnson had informed SFG that it would cease providing effluent to SFG and other effluent customers and requesting that the Company be required to seek Commission approval pursuant to A.A.C. R14-2-402 (C) prior to the discontinuance of the delivery of effluent.

I. BACKGROUND.

This is the third complaint involving Johnson and SFG over the sale and delivery of effluent. The two previous complaints involved allegations regarding, among other things, the failure to deliver effluent and the failure to provide bills in accordance with the applicable rules. Both complaints were dismissed with prejudice.

The current complaint, filed in January 2016, involves Johnson's plan to discontinue the sale of effluent to SFG. According to SFG, after Johnson was cited for a notice of violation ("NOV") by the Arizona Department of Environmental Quality for failure to have on file an effluent delivery agreement, Johnson approached SFG regarding executing an agreement.[1] According to SFG, after meeting with Johnson to discuss its effluent needs, SFG executed and delivered an effluent delivery agreement on January 12, 2016. On January 13, 2016, Johnson notified SFG by email that it would

[1] SFG Complaint at 3.

no longer receive effluent because Johnson was planning to recharge the effluent in order to receive recharge credits. SFG filed this formal complaint ("Complaint") shortly thereafter, requesting that the Company be required to seek Commission approval pursuant to A.A.C. R14-2-402 (C) prior to the discontinuance of the delivery of effluent. In a supplement to its Complaint filed on February 25, 2016, SFU filed the formal notice of the discontinuance of effluent delivery it had received from Johnson.

II. THE COMMISSION HAS SUBJECT MATTER JURISDICTION OVER THE COMPLAINT.

Johnson asserts that the Commission lacks jurisdiction over effluent, because effluent is not water, as a basis for its motion to dismiss. Johnson argues that it is not furnishing water for irrigation because effluent is not water and that the sale of that effluent does not make the provider of that effluent a public service corporation.[2] Such a narrow view of the Commission's authority and of the definition of effluent is not consistent with the applicable authorities. Under its constitutional and statutory authority, the Commission has jurisdiction over Johnson because Johnson is a public service corporation engaged in both sewer and water service. Under this particular set of facts, Johnson's effluent disposal and sale falls within the Commission's purview.

Article XV, section 2 of the Arizona Constitution defines a public service corporation:

> All corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power; or in *furnishing water for irrigation, fire protection, or other public purposes*; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or *engaged in collecting, transporting, treating, purifying and disposing of sewage through a system*, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations.

(Emphasis added). Clearly, Johnson is a public service corporation; it has been certificated to provide both water and wastewater service since 1997.

The Company relies on *Ariz. Pub. Serv. Co. v. Long*, 160 Ariz. 429, 773 P.2d 988 (1989), and *Ariz. Water Co. v. City of Bisbee,* 172 Ariz. 176, 836 P.2d 389 (App. 1991), to assert that the Commission does not have jurisdiction in this matter because effluent is not water. These cases do not support that assertion. In *Long*, Phoenix-area cities had contracts in which they agreed to sell

[2] Johnson reply at 5.

their effluent to utilities that were planning construction of the Palo Verde nuclear power plant.[3] Two ranching companies claimed that they had appropriative rights to surface water flows that largely consisted of the cities' effluent discharges, and that delivering effluent to the utilities would infringe upon these rights.[4] The ranches argued that under Arizona surface water law, the cities had only the right to use the water, not the right to sell unconsumed effluent, since appropriable surface waters belong to the public.[5] Developer John F. Long joined the suit and argued that "the groundwater element of the effluent must be put to reasonable and beneficial reuse for the benefit of the land from which it was withdrawn, and, if reuse is not possible, the effluent must be returned to the common supply, by discharging it into a stream and allowing it to percolate into the ground."[6] In contrast, the cities and utilities contended that the effluent had lost its character as surface water or groundwater, and had become property that the cities could dispose of it as they pleased.[7]

The Arizona Supreme Court rejected all of these arguments. The court found that effluent is neither surface water nor groundwater; it also found that one may have a right to use, but not to own, effluent.[8] Because the legislature had not passed statutes regulating the use of effluent, the cities had the right to put their effluent "to any reasonable use that [they saw] fit," including selling it to the utilities. The court concluded that, "while effluent is neither groundwater nor surface water, it is certainly water." *Id.* at 438, 733.P.2d at 997.

The issues presented in the instant case are different from those presented in *Long*. That case involved issues related to stream appropriation, which depend on classifications of groundwater and surface water. What is important in the instant case is whether Johnson is a public service corporation under Article XV, Section 2. Furthermore, the *Long* case does not hold that effluent is not water. To the contrary, that case specifically recognizes that effluent *is* water. Instead, the Court in *Long* concluded that effluent is neither groundwater nor surface water.

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[3] 160 Ariz. 429, 432, 773 P.2d 988, 991 (Ariz. 1989).
[4] *Id.*
[5] *Id.* at 434, 993.
[6] *Id.*
[7] *Id.*
[8] *Id.*

In *Bisbee*, Arizona Water sued the city over its delivery of effluent to Phelps Dodge for its copper leaching operation.[9] Bisbee had been notified by the EPA that the discharge from its sewer facility did not meet federal requirements. Bisbee then contracted with Phelps Dodge to deliver the sewage effluent to its leaching operation. The effluent that was being delivered by Bisbee was not fit for irrigation purposes or human consumption. The effluent contained pathogenic bacteria, fecal coliform bacteria, and metals such as arsenic and cadmium. Both of the cases cited by Johnson involve municipalities over which the Commission has no jurisdiction. And even more compelling, Johnson's water and sewer operations are regulated by the Commission. The Commission's jurisdiction under Article XV, Section 2 does not depend on the effluent being classified as groundwater or surface water. It instead depends on the Company's operations falling within the text of Article XV, Section 2.

The activities at issue here (the disposal of effluent and its sale for irrigation purposes) are specifically included in Article XV, Section 2, and are "clothed in the public interest," one of the factors used in determining whether an entity is acting as a public service corporation. *See Natural Gas Serv. Co. v. Serv-Yu Coop. 69 Ariz. 328, 213 P.2d 677 (1950).*

III. The Commission possesses the statutory authority to review Johnson's plans for the disposal of its effluent under A.R.S. § 40-321.

The Commission has broad statutory authority with respect to a public service corporation's adequacy of service. A.R.S. § 40-321(A) states:

> When the commission finds that the equipment, appliances, facilities or service of any public service corporation, or the methods of manufacture, distribution, transmission, storage or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine what is just, reasonable, safe, proper, adequate or sufficient, and shall enforce its determination by order or regulation.

In this matter, Johnson is proposing to cease all delivery of effluent from its San Tan treatment facility and instead recharge the effluent. Johnson has alleged that by recharging effluent it will impact its replenishment obligations to Central Arizona Ground Water Replenishment District ("CAGRD"). However, in order to replace the effluent that it sells to SFG and its other effluent

[9] 172 Ariz 176, 836 P.2d 389 (1991).

customer, Johnson must now pump the equivalent in groundwater. The Commission, pursuant to its statutory authority, may determine if this is a reasonable course of action because of the impacts to Johnson's water and sewer operations. The plan may not be reasonable if it causes Johnson to pump more groundwater, which would increase its CAGRD fees without some corresponding reduction because of the recharge. Further, Johnson's increased sales of groundwater will impact its water revenue. These actions could have a significant ratemaking impact, and should be reviewed by the Commission, more specifically in Johnson's next rate case. Staff acknowledges that recharge of the effluent to the CAGRD facility may well be in the public interest. Furthermore, even though the effluent disposal and sale clearly fall within the Commission's jurisdiction, it may well be in the public interest for the Commission to authorize the discontinuance of the sale of the effluent in favor of recharge. But without a hearing, it will be difficult to determine.

Johnson argues that it is acceptable for the Commission to set a rate for effluent, but setting a rate does not confer Commission jurisdiction over effluent. The Court of Appeals addressed this issue in *Johnson v. Swing First Golf,* a recent memorandum decision.[10] In that case, the Court concluded that the tariffed rate for effluent constituted a contract between Johnson and Swing First. The court found that, "[b]ecause the water rates that Utility can charge its customers for CAP water and effluent are set by the ACC, the approved tariffs constitute an enforceable contract between Utility and its customer, SFG . . . ." *Id.* (citing *Sommer v. Mountain States Tel. & Tel. Co.*, 21 Ariz. App. 385, 387-88, 519 P.2d 874, 876-77 (1974)).

Under the Commission's authority under A.R.S. § 40-321 (A), the Commission can oversee a utility's disposal of effluent. For example, *In the Matter of Verde Santa Fe*, Verde Santa Fe Wastewater Company ("VSFWC") filed an application for a reduction in the commodity rate for effluent sales. VSFWC disposed of its effluent by delivering it to a golf course. The golf course had its own well and was refusing to pay the tariffed rate. VSFWC accepted less than its tariffed rate for fear that the golf course would stop accepting the effluent, leaving VSFWC with no way to dispose of the effluent. Fearing a public health and safety issue should the golf course fail to take the effluent, the Commission deferred a decision on the company's request and directed Staff and VSFWC to

[10] Johnson Util LLC v Swing First Golf, LLC, No. 1 CA-CV 13-0625, 2015 WL 5084101 (Ariz. Ct. App. 2015).

explore effluent disposal alternatives. VSFWC also filed with the Commission a plan for effluent disposal alternatives, but the Commission never issued a Decision requiring VSFWC to implement such a plan. The Commission ultimately lowered the effluent rate in Decision No. 74608.

Johnson cites the recently approved application by Liberty Utilities as support for the proposition that the Commission cannot direct a utility on the disposal of its effluent. In that case, Liberty entered into an agreement with the Central Arizona Water Conservation District to build a recharge facility.[11] Liberty, unlike Johnson, produces more effluent than its reuse demands and needed an additional means of disposal. And Liberty, unlike Johnson, presented its plans to the Commission for review. Further, the Commission, in determining the reasonableness of Johnson's recharge plan, can also review whether Johnson is acting in a discriminatory manner by electing to cease effluent delivery from its San Tan facility, which serves SFG, while continuing effluent delivery to a golf course that is a Johnson affiliate.[12]

III. SFG'S CLAIM IS NOT BARRED BY THE DOCTRINE OF *RES JUDICATA.*

In its motion to dismiss, Johnson argues that the current SFG complaint is barred by the doctrine of res judicata and should be dismissed. In the instant case, the doctrine of res judicata cannot be used to defeat the claims of SFG. Johnson asserts that the two prior complaints were judgments on the merits and arose out of the same set of facts. "Claim preclusion, or res judicata bars a claim when the earlier suit (1) involved the same 'claim' or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies." *Howell v Hodap* 221 Ariz. 543, 546 ¶ 17, 212 P.3d 881, 884 (App. 2009). In *Howell*, the Court of Appeals determined that res judicata bars subsequent claims that arise from the same nucleus of facts. *Id.* at 547.

In the instant complaint, the nucleus of facts is different from the prior two complaints. Johnson has ceased all delivery of effluent from its San Tan wastewater treatment facility to SFG and its other effluent customer, electing to deliver only groundwater. In the prior two complaints, there was never a plan by Johnson to permanently cease delivery. On February 19, 2016, Johnson notified

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[11] Decision No. 74993.
[12] Tr. 10:17-24.

SFG that it intended to commence delivery of non-potable groundwater water and to recharge effluent to reduce its CAGRD replenishment obligation. This fact alone serves to defeat the claim by Johnson that the SFG complaint is barred by res judicata.

V. CONCLUSION.

For the reasons above, Staff suggests that SFG's complaint should not be dismissed. An evidentiary hearing would assist the ALJ in evaluating the factual issues surrounding the Company's proposal to use the effluent for recharge, instead of for golf course irrigation. Finally, the Company should consider filing an application to request permission to discontinue service to SFG.

RESPECTFULLY SUBMITTED this 29th day of April, 2016.

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